No. 15748

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FAUSTO GONZALEZ-JIMENEZ,

Appellant,

vs.

ALBERT DEL GUERCIO, District Director of Immigration and Naturalization at Los Angeles, California, *et al.*,

Appellees.

APPELLEE'S BRIEF.

LAUGHLIN E. WATERS,
United States Attorney;
RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief, Civil Division;
BRUCE A. BEVAN, JR.,
Assistant U. S. Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

No. 15748

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FAUSTO GONZALEZ-JIMENEZ,

Appellant,

vs.

ALBERT DEL GUERCIO, District Director of Immigration and Naturalization at Los Angeles, California, *et al.*,

Appellees.

APPELLEE'S BRIEF.

Statement of Jurisdiction.

On July 5, 1956, appellant filed his Complaint for Declaratory Relief and Judicial Review in the United States District Court at Los Angeles, California.* An Answer was filed by appellee on August 1, 1956, and the action was tried on April 1 and April 8, 1957, before the Honorable William M. Byrne, United States District Judge. Judgment was rendered on May 10, 1957, in favor of appellee. A timely notice of appeal was filed on May 28, 1957.

The District Court had jurisdiction of the action pursuant to 5 United States Code Section 1009, 8 United

---

*No reference can be made to the transcript of record since none has been prepared at the present time.

States Code Section 1329, and 28 United States Code Section 2201, *et seq.*

This Court has jurisdiction of the appeal pursuant to 28 United States Code Section 1291.

Statement of the Case.

Although various errors are specified by the appellant, he raises only one point in his argument: whether the denial of appellant's application for *nunc pro tunc* permission to reapply for admission into the United States was arbitrary and an abuse of discretion. This question arose in the following manner.

Appellant is a native and citizen of Mexico who, prior to December 26, 1953, had been within the United States illegally on four separate occasions. On each of these occasions, appellant was allowed the privilege of departing voluntarily from this country in lieu of deportation. On December 26, 1953, after his fifth illegal entry, appellant was ordered deported, but was allowed to depart at his own expense. This procedure constitutes a deportation. (8 U. S. C., Sec. 1101(g); *Corsetti v. McGrath,* 112 F. 2d 719 (9 Cir., 1940).)

It is a felony, as well as a ground of exclusion and deportation, for an alien to enter the United States after once having been deported, without first having obtained the express consent of the Attorney General to his reapplying for admission. (8 U. S. C. Sec. 1326(2); 8 U. S. C. Sec. 1182(a)(17); 8 U. S. C. Sec. 1251(a)(1).) On February 4, 1954, appellant applied for an immigrant visa from the American Consul in Mexico City, without first having obtained said express consent of the Attorney General. In so applying, appellant stated that he had never been deported from the United States. The visa was

granted, and on February 18, 1954, appellant again entered the United States.

On April 30, 1954, appellant was served with a warrant of arrest in deportation proceedings which charged that he was subject to deportation by reason of returning to the United States without first having received the consent of the Attorney General. A deportation hearing was held on this charge on April 28, 1954, and May 25, 1954. On June 22, 1954, a Special Inquiry Officer ordered that appellant be deported, and further found that appellant was ineligible for the privilege of voluntary departure under 8 United States Code Section 1254(e).

No administrative appeal was taken of the June 22, 1954, decision. Instead, appellant petitioned the Special Inquiry Officer on October 29, 1955, to reopen and reconsider the said decision. On December 2, 1955, the Special Inquiry Officer denied the petition to reopen, and granted the petition to reconsider.

Appellant's petition to reconsider requested that he be granted *nunc pro tunc* permission to reapply for admission into the United States. The Special Inquiry Officer denied this request on two grounds: (1) appellant's failure to obtain permission to reapply before obtaining the Mexico City visa was deliberate and not inadvertent; (2) appellant gave false testimony on July 17, 1953, in connection with immigration matters.

An administrative appeal was taken from the denial of the *nunc pro tunc* request, and on April 4, 1956, the Board of Immigration Appeals affirmed the Special Inquiry Officer's decision in that respect by dismissing the appeal.

As the District Court determined in Finding No. IX, appellant waived his right to complain of the finding of

deportability and denial of voluntary departure made in the June 22, 1954, decision. This Finding is not questioned by appellant. Accordingly, the only question here involved is whether the denial of appellant's request for permission to reapply *nunc pro tunc* was arbitrary, and such is the only question argued by appellant in his brief.

Argument.

At the outset, it should be noted that the question involved is one dealing with the discretion of the Immigration and Naturalization Service, since there is no *right* to be granted permission to reapply for admission into the United States, after once having been deported. *A fortiori,* there is no right to be granted such permission *nunc pro tunc* after having illegally re-entered, as did appellant. Similar discretionary decisions have been held to be non-reviewable by the courts.

Anderson v. Holton, 242 F. 2d 596 (C. A. 7, 1957);

United States ex rel. Kaloudis v. Shaughnessy, 180 F. 2d 489 (C. A. 2, 1950).

Even if reviewed, it is readily apparent that the action of the Immigration and Naturalization Service must be upheld. As stated above, the first of the Special Inquiry Officer's reasons for denying the request for *nunc pro tunc* permission to reapply was that the appellant knew he was required to obtain permission to reapply before he applied for the Mexico City visa. In the deportation hearing of April 28, 1954, appellant at first stated he did not know it was necessary to obtain this permission:

> "Q. Did you know that it was necessary to have this permission to reapply after deportation? A. No, I did not know.
>
> * * * * * * * *

Q. Why did you not wait for this permission from Washington before you made your application for your visa? A. I did not know it was necessary to have this permission."

Toward the close of the April 28, 1954, hearing, however, appellant seems to have made a slip:

"Q. Did he [your lawyer] not tell you that when the permission was received from Washington that he would send it to you in Mexico? A. No. All he told us was that he would send it to Washington and that *it was necessary to have this permission to make an application for an immigration visa* before returning to the United States.

* * * * * * * *

Q. After departing from the United States in December, 1953 did you at any time attempt to contact Mr. Marcus concerning your permission to reapply? A. Yes, I wrote him a letter from Mexico asking him what had happened to the permission and I never did receive an answer from him. *After waiting about two months my wife and I went ahead and obtained our visas.*"

Perhaps it was in view of these revealing remarks that appellant reversed his position in the subsequent hearing of May 25, 1954, wherein he stated:

"Q. Mr. Marcus told you that you had to get permission from Washington before you could reapply for a visa with which to enter the United States, is that correct? A. *Yes.*

Q. And you executed an application for that permission and gave it to Mr. Marcus and he was to send it to Washington, is that correct? A. Yes.

Q. But before you received that permission you applied for and obtained a visa with which you entered the United States, is that correct? A. Yes."

In view of the foregoing, it is very clear that there was abundant reason for the Special Inquiry Officer to find that appellant knew he could not lawfully apply for a visa or enter the United States without first having obtained permission from the Attorney General. On this ground alone, the denial of the request for *nunc pro tunc* permission to reapply is exceedingly proper.

The second reason given for the denial of appellant's request was that he had given false testimony in a prior hearing on July 17, 1953. At that time appellant falsely stated he had entered the United States only once before, falsely stated he had not been arrested by Immigration officers on any prior occasions, falsely stated he had not been arrested by police officers anywhere at any time and for any offense, and falsely stated that he had never used any name other than his own. The falsity of such testimony is not denied in appellant's brief. Instead it is argued that since appellant "immediately admitted" the true facts, it is improper for appellee to contend that such testimony constitutes "false swearing and the commission of perjury." (App. Br. p. 22.)

First of all, appellee need not argue that such testimony constitutes perjury or false swearing. The issue is not whether appellant committed perjury—it is whether the denial of discretionary relief to this alien was arbitrary. Thus it was proper to have considered, in determining whether to grant such relief, the fact that appellant testified falsely concerning immigration matters, whether or not the technical crime of perjury exists. The admitted

falsity is sufficient to take the denial out of the category of arbitrary actions even though there might have been a subsequent recantation.

However, no such recantation, as that term is employed by this Court, took place. Appellant's brief quotes from *Llanos-Senarillo v. United States,* 177 F. 2d 164 (C. A. 9, 1949). In that case the alien falsely answered questions under oath and corrected the falsity of the answers only after having been confronted with proof thereof. The *full* text of this Court's remarks is set forth below:

> "The point depends upon the facts of the case. If the witness withdraws the false testimony *of his own volition* and without delay, the false statement and its withdrawal may be found to constitute one inseparable incident out of which an intention to deceive cannot rightly be drawn. Such is not the case here. The withdrawal, if the circumstances justify the word, and the recanting, if appellant did recant, followed *only after he knew his false testimony would not deceive.* The reasons given for the false statements amount to confession and avoidance which cannot consider.
>
> "United States v. Norris, supra, is an authoritative statement on the point and supports our view.
>
> "We have assumed that appellant did recant his prior statements. To recant a prior statement or previous assertion is to renounce and withdraw it. It is doubtful on this record whether appellant ever so acted. Rather, the immigration inspector simply proved the contrary by conclusive documentary evidence and by appellant's admission that such evidence related to him." (Emphasis added.)

Under the foregoing clear-cut formula, appellant's testimony of July 17, 1953, set forth at pages 21-22 of his Opening Brief, must be analyzed. It is obvious that appellant would have continued to deny prior illegal entries and prior arrests by immigration officers and others, had not appellant learned the immigrant inspector had positive knowledge thereof. It was not until the inspector revealed that he knew the alias appellant had used on the occasion of prior arrests that appellant decided to "recant." Such a recantation hardly can amount to a *voluntary* withdrawal of the false testimony. Consequently, such false testimony is more than sufficient basis for denying appellant's request for *nunc pro tunc* permission to reapply.

An additional reason for such denial, which was advanced by the Board of Immigration Appeals, was that appellant was in this country illegally for the sixth time. On four occasions of prior illegal entry, appellant had been granted the privilege of voluntary departure in lieu of deportation. The previous privileges accorded appellant apparently did nothing but encourage him to repeat his offenses.

If the Immigration and Naturalization Service had granted appellant his request for *nunc pro tunc* permission to reapply for admission, the charge upon which he presently has been found subject to deportation (failure to have such permission prior to entry) would have been eliminated, and appellant would have been free to remain in the United States. In view of appellant's prior immigration record, this would have been absurd. Conse-

quently, the five previous illegal entries, standing alone, would have been ample reason for denying appellant the right to remain in the United States.

Conclusion.

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief, Civil Division,

BRUCE A. BEVAN, JR.,
Assistant U. S. Attorney,
Attorneys for Appellee.